

BEFORE THE INDUSTRIAL COMMISSION OF THE STATE OF IDAHO

LANA S. SWAIN,

Claimant,

v.

DATA DISPATCH, INC.,

Employer,

and

IDAHO STATE INSURANCE FUND,

Surety,

Defendants.

IC 2005-528388

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND ORDER**

Filed February 24, 2012

INTRODUCTION

Pursuant to Idaho Code § 72-506, the Idaho Industrial Commission assigned the above-entitled matter to Referee Rinda Just, who conducted a hearing on December 21, 2010. Claimant was present and represented by Clinton E. Miner of Boise. Defendants were represented by Jon M. Bauman, also of Boise. Post-hearing depositions were taken, and the parties submitted post-hearing briefs. The matter came under advisement on May 12, 2011. By order filed November 7, 2011, the matter was re-assigned to the Commissioners. It is now ready for decision.

ISSUES

By agreement of the parties at hearing, the issues to be decided are:

1. Whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition;

2. Whether and to what extent Claimant is entitled to the following benefits:

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 1

- a. Medical care;
- b. Temporary partial and/or temporary total disability (TPD/TTD);
- c. Attorney fees;

3. Whether apportionment for a pre-existing or subsequent condition pursuant to Idaho Code § 72-406 is appropriate; and

4. Whether Defendants are entitled to credit or offset with respect to any benefits that are due or may come due from payment made to Claimant by third parties.

CONTENTIONS OF THE PARTIES

It is undisputed that Claimant was involved in a work-related automobile accident on December 5, 2005.

Claimant contends that, as a result of the accident, she suffered a left hip injury that has caused her current need for a total hip arthroplasty. She relies on the opinions Gregory Ferch, D.C., and Richard Radnovich, D.O., to support her contention. Furthermore, she is entitled to temporary total disability benefits, as her injury has rendered her incapable of working, and she will not be able to return to work until after she has received appropriate medical care and her condition has stabilized. Finally, Claimant is entitled to attorney fees, because Defendants' denial of her claim for medical care is unreasonable.

Defendants respond that Claimant's hip condition was not caused by an injury sustained in the accident, but rather by Claimant's pre-existing osteoarthritis. Defendants rely on the opinions of Michael Meier, M.D., and Paul Traugher, M.D., to support their contention. Defendants argue that their reliance on these opinions is reasonable and that Claimant is not entitled to attorney fees. Additionally, Claimant has not offered proof that establishes her entitlement to temporary disability benefits.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 2

EVIDENCE CONSIDERED

The record in this matter consists of the following:

1. The testimony of Claimant taken at hearing;
2. The depositions of Gregory Ferch, D.C.; Richard Radnovich, D.O.; Paul Traughber, M.D.; and Claimant;
3. Claimant's Exhibits 1-18 admitted into the record at hearing;
4. Defendants' Exhibits 1-11 admitted into the record at hearing; and
5. The Industrial Commission legal file pertaining to this claim.

Claimant's relevance objection posed at page 67, line 16 of Dr. Ferch's deposition is sustained, and her motion to strike is granted. Therefore, page 68, lines 7 through 25, and page 69, lines 1 through 9 of Dr. Ferch's deposition are struck from the record.

All other objections posed during the depositions are overruled.

After having considered the evidence and the briefs of the parties, the undersigned Commissioners make the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. Claimant was born on January 9, 1952. At the time of hearing, she was 58 years old and resided in Boise.
2. In October 2005, Claimant began to work as a dispatch driver for Employer. Claimant's job duties included picking up and delivering parcels and mail to various locations. Claimant drove a standard-transmission company vehicle to make her deliveries. Her work schedule included a morning shift, which ran from 6:00 to approximately 8:00 a.m., and a day shift, which ran from noon to 5:00 p.m. or later.

3. On December 5, 2005, while on her morning shift,¹ Claimant was involved in a motor vehicle accident at the intersection of Cloverdale and Franklin Roads in Boise. Claimant was approaching the intersection at approximately 45 miles per hour when a pickup truck, in violation of Claimant's right-of-way, turned in front of Claimant. Claimant's vehicle "T-boned" the pickup. Both of Claimant's airbags deployed, striking her hands and wrists. Claimant testified that at the time of the collision, her right foot was on the brake, and her left foot was on the floor.

4. Claimant was assessed by paramedics at the scene. She denied head, neck, and back pain, but said that her neck and low back were becoming "tight." She reported pain in her hands and said her knees were "aching a little." However, she was able to walk with a steady gait. The paramedics' report reflects that Claimant's vehicle sustained damage to the front end and the driver's side, but the steering wheel and windshield remained intact, and there was no passenger compartment intrusion.

5. Claimant was transported by ambulance to St. Luke's Meridian Medical Center. At the emergency department, she complained of left hand swelling and pain, and also of right hand and wrist pain. She reported neck stiffness and right-sided chest pain as well. She denied other symptoms. After examining Claimant, emergency department personnel found:

[T]here is moderate swelling and tenderness to the left hand over the carpal bones with obvious ecchymosis and tenderness; the right wrist is also tender with any range of motion or palpation; otherwise, normal range of motion to major joints; pelvis is stable to pressure; no pain to palpation of thoracic spine; there is moderate tenderness to palpation over the lumbar spinous processes.

¹ Defendants note in their brief that the accident occurred after Claimant had completed her morning shift. However, Defendants do not dispute that Claimant's accident occurred while she was acting in the course and scope of her employment.

6. Hand, wrist, and lumbar spine X-rays were taken. The X-rays revealed that Claimant suffered no acute fractures. Claimant was diagnosed with a sprained wrist and lumbar strain. She was prescribed pain medication and wrist splints and then discharged. Claimant was advised that if she had any new concerns or symptoms, she should be rechecked. Claimant never returned to be rechecked.

7. Claimant missed five of her morning shifts following the accident; however, she continued to work her day shifts. She did not otherwise miss any work due to the accident.

8. On December 6, Claimant presented to Gregory Ferch, D.C., for chiropractic therapy. She reported symptoms including headache, dizziness, confusion and disorientation, neck pain, shoulder pain, wrist pain, back pain, and knee pain. She did not report hip pain. Claimant informed Dr. Ferch that her symptoms appeared immediately after the accident, but said they were worse than they had been the day before. Dr. Ferch diagnosed Claimant with cervical sprain with tension headache and myospasm, thoracic sprain, lumbosacral strain with myospasm, wrist contusion, and knee strain/sprain. He did not diagnose a hip condition.

9. Claimant returned to Dr. Ferch for treatment on December 8. She reported that she felt a “catch” in her groin the night before. She continued to treat with Dr. Ferch for the next several months, seeing him 36 times from December 6, 2005 through April 26, 2006. On December 27, Dr. Ferch noted that Claimant had “left leg/groin symptoms.” He also noted “mild twinges in the groin area” on January 9, but Claimant’s chief complaints related to her back and neck. She did not report any hip pain.

10. On February 20, 2006, Dr. Ferch noted that Claimant’s current chief complaint was neck pain. Hip pain was not mentioned. Dr. Ferch recommended that Claimant undergo therapeutic massage therapy in addition to chiropractic care.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER - 5

11. Claimant underwent several therapeutic massage sessions from March 11 to April 15, 2006. Therapist notes indicate that Claimant's concerns were her back, wrists, upper arms, and neck. She also reported knee pain. Neither hip pain nor groin pain was mentioned in the massage therapy notes.

12. On April 5, 2006, Surety referred Claimant to Paul Collins, M.D., for an independent medical evaluation. Dr. Collins reviewed Claimant's medical records and conducted a physical examination of Claimant on April 26, 2006. He diagnosed Claimant with a low back sprain, cervical spine strain, and bilateral wrist contusions. He recommended that Claimant undergo physical therapy but cease chiropractic treatment. He opined that she was approaching medical stability and that there would likely not be any permanent impairment as a result of the accident. Hip problems were not mentioned in Dr. Collins's report.

13. Dr. Ferch disagreed with Dr. Collins's conclusion that chiropractic care was no longer necessary. He also disputed Dr. Collins's opinion that Claimant had likely sustained no permanent impairment. Dr. Ferch referred Claimant to Richard Radnovich, D.O., for a second opinion.

14. On June 16, 2006, Claimant presented to Dr. Radnovich with complaints of neck, back, wrist, and knee pain. Dr. Radnovich diagnosed Claimant with cervicalgia, lumbalgia, disorders of bursae and tendons in the shoulder region, and myofascitis. Neither hip pain nor groin pain is mentioned. Dr. Radnovich noted the possibility that Claimant was developing chronic pain syndrome. He prescribed Piroxicam, an anti-inflammatory agent, and Baclofen, a skeletal muscle relaxant. He also recommended that she continue to treat with Dr. Ferch and follow up in two weeks.

15. On July 6, 2006, Claimant was seen by Kelleen Fakenbridge, a nurse practitioner

in Dr. Radnovich's office. Claimant reported neck and back pain. She also stated that work made the pain worse and that, while she had once enjoyed going to work, she now dreaded it. Ms. Fakenbridge believed Claimant was suffering from depression and prescribed an antidepressant, Wellbutrin XL. She discontinued Claimant's prescription for Baclofen, as Claimant reported negative side effects, and prescribed Skelaxin instead.

16. Claimant followed up with Ms. Fakenbridge on July 13, 2006. Claimant reported that her shoulder was feeling better but that she was having trouble sleeping. Ms. Fakenbridge reduced Claimant's dosage prescription for Wellbutrin XL and advised her to follow up again in two weeks.

17. On July 26, 2006, at Surety's request, Dr. Collins responded to the concerns expressed by Dr. Ferch. Dr. Collins stated that he had considered Dr. Ferch's opinion, but his own opinion was unchanged. He believed Claimant needed to engage in active physical therapy as opposed to passive chiropractic therapy.

18. Claimant followed up with Ms. Fakenbridge on July 28, 2006. Claimant reported that she was in severe pain after her low back "caught" while she was getting out of the bathtub. The pain radiated into her groin, thigh, and knee. Ms. Fakenbridge referred Claimant to physical therapy.

19. On August 1, 2006, Claimant presented to Sue Birnbaum, M.P.T., for physical therapy. She reported back pain, neck pain, headaches, and tightness in her hip area. Ms. Birnbaum recommended therapeutic treatment two times a week for six weeks.

20. Claimant followed up with Ms. Fakenbridge on August 8, 2006. Claimant reported that she had seen her physical therapist twice and was feeling better. However, she continued to feel a catch in her groin and hip whenever she was driving and getting in and out of

her vehicle. Ms. Fakenbridge noted that she would discuss a possible labral tear with Dr. Radnovich and would “get films” if the catching in the hip continued. Claimant was advised to follow up in three weeks.

21. The next day, Claimant attended a physical therapy session and reported a pulling sensation in her groin. Progress notes on August 15, August 16, and August 24 also list hip and/or groin pain. On August 29, Claimant returned to Ms. Fakenbridge and reported that her back was feeling better, and that she was working on her hip and groin pain in physical therapy. She asked to be tapered off her antidepressant prescription, as Claimant did not believe it was necessary anymore. Her other medications were refilled.

22. From August 1 through September 6, 2006, Claimant attended twelve physical therapy sessions. Her therapist requested that Surety authorize more sessions, as Claimant’s condition was improving but not yet stable. Surety forwarded the request to Dr. Collins and asked for his opinion.

23. On September 28, 2006, Claimant returned to Dr. Ferch for chiropractic treatment, reporting a catch in her groin and soreness through her hip area. On September 29, Claimant saw Dr. Radnovich, who noted:

Her biggest problem now is her left groin and lateral hip. This has been a problem *for a few months* and has gotten more pronounced as her other pain has subsided. Worse going up stairs. It is so bad that she has been thinking of getting a cane. She cannot squat down. (emphasis added)

Dr. Radnovich ordered an MRI of the left hip. He prescribed Ultram ER, a pain medication. He also noted that a hip injection should be considered.

24. On October 4, 2006, Dr. Collins responded to Surety’s request for his opinion on continued physical therapy. He stated that he had reviewed the therapist’s notes but believed that

Claimant should “move from a structured physical therapy program to a self-directed program.” He opined that Claimant had attained medical stability.

25. On October 10, 2006, an MRI was taken of Claimant’s left hip. Dallas Peck, M.D., a diagnostic radiologist, reported findings of moderate to severe left hip joint osteoarthritis as well as a possible labral tear. At Dr. Radnovich’s request, Dr. Peck also injected Claimant’s hip with anesthetic, which provided “significant relief” for her pain. Three days later, Dr. Radnovich met with Claimant to discuss the MRI findings and possible treatments, including medication, injection therapy, physical therapy, and surgery. Claimant preferred to avoid surgery and opted for conservative care. Dr. Radnovich prescribed additional pain medications.

26. On October 24, 2006, Surety advised Dr. Ferch that it would not authorize any additional treatment for Claimant, based on Dr. Collins’s opinion that Claimant had reached maximum medical improvement.

27. Claimant continued to see Dr. Radnovich and Dr. Ferch for hip pain. Her conservative treatment included pain medication and massage therapy. Dr. Radnovich noted in March 2007 that Claimant was “hoping she will not need surgery on her labral tear.” She was “very anxious” about how she would support herself during recovery. Nevertheless, on March 29, Dr. Radnovich wrote to Claimant’s attorney that Claimant’s symptoms were not resolving with conservative care and that it was likely Claimant would require surgery. He did not specify what kind of surgery would be necessary.

28. On April 9, 2007, Dr. Radnovich recommended that Claimant consult with a surgeon. Claimant apparently did not do so, and in May, she reported to Dr. Radnovich that her condition was improving. She was able to increase her activity levels and cut back on her pain medications. Dr. Radnovich recommended that she avoid aggravating activities and continue

tapering off her pain medications.

29. For a time, Claimant's condition seemed to improve, though she still experienced pain in her hip. She stopped taking her pain medications for a few months, but then her pain increased and became severe. She resumed taking her medications, but she was unable to "return to [a] good level of pain control," according to Dr. Radnovich's notes. On March 18, 2009, she informed Dr. Radnovich that she wanted to discuss options for pain control and possible surgery. She told him that the pain no longer seemed to respond to her medications and that she was "close to not being able to go to work." On April 6, 2009, Dr. Radnovich noted that Claimant had not responded well to medical management and that he would try to arrange a surgical consultation. Claimant was referred to Richard E. Moore, M.D., an orthopedic surgeon.

30. Claimant quit her position with Employer in early May 2009, after it became too painful for her to continue working.

31. On May 28, 2009, Claimant presented to Dr. Moore. He took X-rays of her left hip, which revealed "significant bone-on-bone collapse into the acetabulum." He judged it "more likely than not [that] some avascular necrosis has been caused to the head of the femur." Dr. Moore diagnosed Claimant with severe arthritis and recommended a total hip arthroplasty based on the breakdown in bone. Dr. Moore referred Claimant's case to his associate, Mark Williams, D.O., for an opinion on causation.

32. Dr. Williams met with Claimant on June 5, 2009 to evaluate her case. He also reviewed her medical records. He opined that it was more likely than not that some of Claimant's arthritis pre-existed her accident. However, he believed Claimant's accident had contributed to Claimant's condition:

[G]iven the labral tear that was seen on the 2006 MRI and given the severe progression, the fact that she had no prior to the injury

[sic] in 2005, and that her right hip is stable, I feel that there is some contributing mechanisms [sic] that were related to the high velocity motor vehicle accident of 2005....Due to the severity of this injury and the probable avascular necrosis, I feel that probably 90% of her current injury is related to her motor vehicle accident.

Dr. Williams noted that his opinion might change if “more information were to arise.”

33. Surety referred the case to Paul Traughber, M.D., a board certified radiologist, for a causation opinion. Dr. Traughber reviewed Claimant’s medical records and radiographic studies but did not examine Claimant in person. Dr. Traughber opined that Claimant had osteoarthritis prior to her accident, as evidenced by the lumbar spine X-ray taken of Claimant on the day of her accident. The X-ray, which also showed Claimant’s left hip, revealed evidence of arthritis in the hip, specifically bone spurs and sclerosis. At his deposition, Dr. Traughber testified that these bone changes would not appear immediately after an accident, but rather would have developed over time.

34. According to Dr. Traughber, the 2006 MRI showed that Claimant had osteoarthritis in her right hip as well as her left. There was bone spurring in both hips, though the spurs were “not as marked” in the right hip. There was no evidence of avascular necrosis at that time. As for the possible labral tear, Dr. Traughber testified that such a tear is commonly associated with osteoarthritis, though he acknowledged it could be caused by trauma as well. He believed Claimant’s labral tear was more likely a “feature” of her arthritis than a traumatic injury. He opined that the presence of osteoarthritis in Claimant’s right hip as well as her left demonstrated that her osteoarthritis was not caused by the accident, as Claimant would be unlikely to develop post-traumatic arthritis in both hips.

35. By 2009, Dr. Traughber stated, Claimant’s condition had changed dramatically. The X-rays revealed severe osteoarthritis with likely avascular necrosis. Dr. Traughber explained

at deposition that avascular necrosis is essentially death of the bone. It occurs when a patient loses blood supply to an area of the bone. The process is a rapid one, occurring over a few months or even weeks, not over a long period of time. Though there is “quite a bit of controversy” over what causes avascular necrosis, risk factors include osteoarthritis, steroid use, and alcoholism. Dr. Traughber testified that while avascular necrosis sometimes occurs “shortly” after auto accidents, such cases generally involve dislocation of the hip and acute interruption of the blood supply.

36. Dr. Traughber opined that Claimant needs a total hip replacement due to her avascular necrosis. However, there is “very little chance” that Claimant’s accident caused avascular necrosis, given the length of time that passed between the accident and the onset of the condition. Furthermore, it is unlikely that Claimant’s motor vehicle accident injured her hip in any way. Dr. Traughber testified that there are three “commonly accepted mechanisms of injury” to the hip in a motor vehicle accident. First, the hip could be directly impacted (for example, by the door caving in and striking the hip). Second, the hip could be indirectly impacted by a dashboard injury, whereby the knee strikes the dashboard, producing a “force vector” that travels up from the kneecap to the hip joint. Third, if a driver’s foot is on the brake pedal, applying pressure at the time of collision, a force vector could travel up the leg and injure the hip. None of these mechanisms could have occurred in Claimant’s accident. Her hip was not directly impacted, and a dashboard injury would have caused significant observable trauma to Claimant’s knee, which was not present. Further, Claimant’s left foot was on the floor, not the brake, and Dr. Traughber could not “conceive of a way that you would get much force from the floor of a vehicle sufficient to cause a hip injury.”

37. Dr. Traughber believes that Claimant’s osteoarthritis is the likely cause of her

avascular necrosis, and her osteoarthritis was likely caused by her obesity.² Dr. Traugher testified that osteoarthritis is caused by “abnormal mechanical stress,” and that obesity is such a stressor.

38. Surety also asked Mark C. Meier, M.D., a board certified orthopedic surgeon, to provide a causation opinion. Dr. Meier reviewed Claimant’s medical records but did not examine her in person. Dr. Meier found that Claimant had severe avascular necrosis with collapse of the left hip, and stated that, because of this condition, Claimant required a total hip replacement. However, Dr. Meier concurred with Dr. Traugher’s opinion that it was unlikely Claimant’s hip was injured by the motor vehicle accident. Dr. Meier noted that Claimant did not complain of hip pain at the emergency department and that she walked without difficulty immediately following the accident. In the medical records, there is no mention of contusion or bruising that would indicate she had significant force applied to her hip. She did not even begin to complain of hip pain until eight months after the accident.

39. Dr. Meier cited several potential causes of avascular necrosis, including steroid use, alcoholism, and trauma. However, he found “no convincing evidence in review of the medical records that [Claimant] sustained enough trauma to her hip at the time of the accident to result in avascular necrosis.” He agreed with Dr. Traugher that osteoarthritis is a risk factor for avascular necrosis, but stated that “idiopathic avascular necrosis is more common.” That is, “avascular necrosis occurs in a significant number of people for no apparent reason at all.”

40. Surety forwarded the reports of Dr. Traugher and Dr. Meier to Dr. Williams for his review. Dr. Williams concurred that Claimant’s osteoarthritis pre-existed her accident and granted that the osteoarthritis could be a “contributing factor” to the avascular necrosis.

² Claimant is five feet, two inches tall, and over the past several years, her weight has ranged between 180 and 192 pounds.

Nevertheless, “there is the possibility that her sudden change was in part related to her motor vehicle accident.” He stated that he was “unable to give a percentage of chance.”

41. On October 15, 2010, Claimant presented to Dr. Williams for follow-up. She informed him that her hip had worsened in the last year but that she was unable to afford the recommended total hip arthroplasty on her own. Dr. Williams noted his belief that Claimant had “significant exacerbation and aggravation” of her hip condition due to the accident. He observed that she experienced no pain prior to the accident but experienced significant pain after it.

42. Surety forwarded Dr. Williams’s note to Dr. Meier and Dr. Traugher for their review. Both confirmed that their opinions regarding causation were unchanged. Dr. Meier wrote that his opinion was based on the fact that Claimant’s “condition warranting surgery” was avascular necrosis with collapse. He stated that she had an MRI several months after the accident that showed no evidence of avascular necrosis. Had the accident caused the avascular necrosis, “it would have been present on her MRI.” Likewise, Dr. Traugher responded:

I find no evidence in the updated medical records that her hip osteoarthritis or avascular necrosis was related to the accident. Instead I believe the underlying cause of the arthritis in this patient was her pre-existing obesity. This is a very common risk factor for developing lower extremity osteoarthritis. I believe within the limits of medical probability that obesity is the etiology for her osteoarthritis and that the osteoarthritis is the most likely etiology for her avascular necrosis of the hip.

43. Claimant solicited causation opinions from Dr. Radnovich and Dr. Ferch. Both agreed that Claimant’s hip was injured in her motor vehicle accident. Dr. Radnovich, who is board certified in family medicine, osteopathic manipulative treatment, and sports medicine, opined that Claimant’s labral tear — though not her osteoarthritis — was caused by the accident. He testified that the “catch” in the groin Claimant experienced is common for people suffering from labral and hip joint pathology. Pain in the hip can radiate to the groin. Dr. Radnovich

believes that Claimant's labral tear was her primary pain generator when he treated her, because she had arthritis in both hips, but only pain in her left hip. He also testified that knee pain without knee pathology, as Claimant experienced, can be indicative of a problem in the hip. At deposition, Dr. Radnovich clarified that the surgery he was contemplating for Claimant at the time he was treating her was a hip arthroscopy, not the total hip arthroplasty now recommended. Dr. Radnovich has not reviewed Claimant's most recent medical records and stated that he did not have enough information to render an opinion on the cause of Claimant's avascular necrosis.

44. Dr. Ferch testified that he believes Claimant's hip was injured by the motor vehicle accident. He described the mechanism of injury as the force of the collision traveling up from Claimant's foot, through her leg, to her hip, as her foot was "braced" on the floor. He also testified that a patient's pain complaints are often not anatomically accurate, and that Claimant's complaints of pain in her low back, knee, groin, left leg, SI joint, and "glutes" in the months following her accident could actually have been indicative of hip pathology. Dr. Ferch did not specifically opine on the cause of Claimant's avascular necrosis.

DISCUSSION, FURTHER FINDINGS, AND CONCLUSIONS OF LAW

45. The provisions of the workers' compensation law are to be liberally construed in favor of the employee. *Haldiman v. American Fine Foods*, 117 Idaho 955, 956, 793 P.2d 187, 188 (1990). The humane purposes that it serves leave no room for narrow, technical construction. *Ogden v. Thompson*, 128 Idaho 87, 88, 910 P.2d 759, 760 (1996). Facts, however, need not be liberally construed in favor of the worker when the evidence is conflicting. *Aldrich v. Lamb-Weston, Inc.*, 122 Idaho 361, 363, 834 P.2d 878, 880 (1992).

Causation

46. It is undisputed that Claimant has suffered avascular necrosis with hip collapse,

and that the appropriate treatment for this condition is a total hip arthroplasty. The primary dispute in this case is causation, that is, whether Claimant's hip condition was caused by her accident.³ Claimant bears the burden of proving that the condition for which compensation is sought is causally related to the accident. *Callantine v. Blue Ribbon Supply*, 103 Idaho 734, 653 P.2d 455 (1982). To prove such causation, Claimant must offer medical testimony supporting the claim to a reasonable degree of medical probability. *Langley v. State of Idaho, Industrial Special Indemnity Fund*, 126 Idaho 781, 785, 890 P.2d 732, 736 (1995). "Probable" is defined as having more evidence for than against. *Fisher v. Bunker Hill*, 96 Idaho 341, 344, 528 P.2d 903, 906 (1974). Claimant must establish a probable, not merely possible, connection between cause and effect to support her claim. *Callantine*, 103 Idaho at 735, 653 P.2d at 456.

47. Claimant argues that her hip was injured in her motor vehicle accident, and that this injury caused a decline in her hip that ultimately led to her avascular necrosis. Claimant cites the opinions of Dr. Ferch, Dr. Radnovich, and Dr. Williams to support her argument. Defendants counter that Claimant did not suffer a hip injury in the accident. They assert that the medical evidence does not support such a conclusion, citing the opinions of Dr. Traugher and Dr. Meier.

48. Medical records from the day of Claimant's accident do not support a finding that she sustained a hip injury. Claimant did not report hip pain to the paramedics or to emergency

³ Though the agreed-upon noticed issue is phrased as whether Claimant's condition is due in whole or in part to a pre-existing and/or subsequent injury or condition, the focus of the parties in their briefs is on whether the accident caused Claimant's condition. *See e.g.* Claimant's Opening Brief, p. 12 ("Lana injured her left hip as a result of the accident") and p. 16 ("Lana Swain suffered an injury to her hip in the accident of December 5, 2005....[Her] treating doctors ... have made it clear that [her condition is] directly related to the injuries sustained in that accident"); Defendants' Post-Hearing Brief, p. 1 ("Claimant has avascular necrosis of the hip and must prove that this condition was caused when she was involved in a motor vehicle accident on December 5, 2005"), p. 22 ("Claimant's experts do not offer a coherent or plausible explanation of Claimant's alleged hip injury at the time of the accident, what kind of hip injury the accident produced, or how the accident could have caused her avascular necrosis"), and p. 24 ("Thus, the overwhelming weight of evidence establishes that Claimant's avascular necrosis was not produced by her accident"). Additionally, the opinions solicited from the medical experts focus primarily on whether Claimant's condition was caused by the accident; only Dr. Traugher affirmatively discussed other potential causes at length.

department personnel. She was able to walk normally. There is no evidence that she suffered observable trauma to her hip, such as bruising, that would indicate her hip was directly impacted in the accident. Nor is there evidence of observable trauma to Claimant's knee, which would indicate a dashboard injury that might have traveled up to Claimant's hip. The Commission finds Dr. Traugher's testimony about possible mechanisms of injury in a motor vehicle accident well-reasoned and persuasive. However, even if the Commission were to accept Dr. Ferch's theory that the force of a collision — in a front-end accident — could travel up from the floor of the vehicle through Claimant's foot and leg up to her hip, we find it unlikely that such force would do damage *only* to Claimant's hip, and not to other parts of her leg (especially her foot, which would receive the brunt of the force, just as the knee would receive the brunt of the force in a dashboard injury). Here, there is no indication that Claimant complained of leg or foot trauma following the accident, except for mild knee pain. Simply stated, none of the evidence developed on the day of the accident points to a hip injury.

49. Likewise, medical records from the days and months subsequent to the accident offer little to support a conclusion that Claimant sustained a hip injury. Her accident occurred in December 2005. She did not begin to complain of hip pain until early August 2006. In the intervening period, she complained of, and was treated for, hand and wrist pain, back pain, neck pain, and various other complaints, but not hip pain. Claimant argues that some of the pain she experienced, most specifically groin pain (as early as two days after the accident), could be indicative of hip pathology. Dr. Radnovich and Dr. Ferch testified, and Dr. Traugher conceded, that groin pain is often associated with hip pathology. However, none of these complaints, at the time, caused Dr. Ferch or Dr. Radnovich to suspect that Claimant had hip problems. Dr. Radnovich ordered the MRI of Claimant's hip only after Claimant had been consistently and

specifically complaining of *hip* pain for, as he noted, a “few months.” The MRI was taken in October 2006. This was far more than “a few months” after the accident. While it is certainly true that pathology in one part of the body can cause referred pain in other parts of the body, it is clear from the record that neither Dr. Ferch nor Dr. Radnovich suspected that Claimant suffered a hip condition until she actually complained of hip pain. Had Claimant’s varied symptoms been as strongly associated with hip pathology as Claimant now argues, then it is reasonable to conclude that her treating physicians would have referenced a hip injury in their differential diagnoses at the outset.

It is also worth noting that Claimant does have a history of low back pain that predates the subject accident. (*See* Defendants’ Exhibit 1 at 25, Claimant’s Exhibit 5 at 126.) If a hip injury can present as low back pain, then it follows that Claimant could just as easily have had a symptomatic hip injury that predated the subject accident. Indeed, all of the physicians who have examined Claimant’s case acknowledge that her osteoarthritis predated the accident.

50. Furthermore, even if post-accident pain in the back, knee, groin, and other areas indicated that Claimant suffered from a hip condition, there is no evidence that such a condition was caused by the motor vehicle accident. Dr. Radnovich and Dr. Williams based their causation opinions, essentially, on the fact that Claimant did not experience pain in her hip prior to the accident, but began to have hip problems post-accident. This is a classic *post hoc ergo propter hoc* fallacy. Neither Dr. Radnovich nor Dr. Williams explained how, exactly, Claimant’s hip was injured by the accident, nor how such an injury produced Claimant’s current hip condition. They concluded that Claimant’s hip pain was caused by the accident because it post-dated the accident. Without more, the opinions of Dr. Radnovich and Dr. Williams are unpersuasive. Although a temporal relationship is always required to support a finding of causation between an

accident and an injury, the existence of a temporal relationship alone, in the absence of other medical evidence establishing causation, is insufficient to meet Claimant's burden of proof.

51. Dr. Ferch did offer a theory as to how Claimant's hip was injured in the accident, and he pointed to Claimant's nearly contemporaneous groin pain as an indication that Claimant's hip was injured. However, Dr. Ferch's theory on the mechanism of injury is not consistent with Claimant's actual, immediate post-accident injuries and complaints. As Dr. Traugher testified, Claimant's hip was not directly impacted, and if it had been injured by force vectors moving up her leg, there would have been trauma at the point of her body where the force first entered. No such trauma was observed by paramedics or emergency department personnel, and Claimant did not complain of such trauma. Her primary concern was pain in her hands and wrists, which had been impacted by a deployed airbag. There is no evidence in the record that any other part of her body, specifically her left hip or left leg, was impacted.

52. We note that X-rays taken on the day of the accident revealed that Claimant was already suffering from osteoarthritis of the left hip. Claimant's experts failed to explain why the groin pain (or other pain) she experienced following the accident — if it was due to hip pathology — was necessarily related to a traumatic injury and not to the pre-existing osteoarthritis. Dr. Radnovich assumed that Claimant's hip pain was due to a labral tear sustained in the accident, and not to osteoarthritis, because she also had arthritis in her right hip and her right hip was asymptomatic. However, Dr. Radnovich did not explain *how* the accident produced a labral tear, and if it did, why direct pain in the hip only started eight months post-accident. Neither Dr. Radnovich nor Dr. Ferch offered an explanation for why a labral tear, specifically, would create pain in Claimant's groin, leg, low back, knee, etc., before it created pain in the hip itself.

53. Even if Claimant had proven that she sustained a hip injury, she has failed to prove that the injury caused her avascular necrosis and her present need for a total hip replacement. Claimant asserts in her brief that her avascular necrosis is a “natural digression” of a hip injury caused by the accident. The record, however, is bereft of medical evidence that would support this contention. Dr. Radnovich opined that Claimant’s labral tear was caused by her accident, but declined to opine on the cause of Claimant’s avascular necrosis. Likewise, Dr. Ferch did not specifically opine on the cause of the avascular necrosis. Dr. Traugher opined that Claimant’s osteoarthritis is the cause of her avascular necrosis, and it is undisputed that the arthritis pre-existed the accident. Dr. Meier asserted that in most cases, avascular necrosis has no known cause at all. Dr. Williams appeared to believe that Claimant’s avascular necrosis was caused by her accident, in that her accident somehow worsened her pre-existing hip condition, but he did not explain how an accident in 2005 would produce avascular necrosis in 2009. Dr. Traugher’s testimony that avascular necrosis occurs over a short period of time has not been refuted by Claimant. Additionally, no doctor in this case has opined that avascular necrosis is the “natural” result of a labral tear, nor adequately explained how an alleged hip injury experienced in 2005 produced a chain reaction that ultimately led to avascular necrosis.

54. Claimant has failed to prove that she suffered a hip injury caused by her motor vehicle accident. As such, she has failed to prove that her current hip condition was caused by her motor vehicle accident.

Temporary Disability

55. An injured worker is entitled to temporary disability benefits during the period of recovery. Idaho Code § 72-408. The burden is on the claimant to present expert medical opinion evidence on the extent and duration of her disability in order to recover income benefits for such

disability. *Sykes v. C.P. Clare and Co.*, 100 Idaho 761, 763, 605 P.2d 939, 941 (1980); *Malueg v. Pierson Enterprises*, 111 Idaho 789, 791, 727 P.2d 1217, 1220 (1986). An injured worker shall not be allowed income benefits for the first five days of disability for work following the accident. Idaho Code § 72-402.

56. Claimant testified that she missed five morning shifts in the days after her accident but continued to work her day shifts. She has not provided medical evidence that she was disabled from working mornings, and, indeed, the fact that she was able to perform her regular duties in the afternoon shows that she was not disabled. Furthermore, these five days fall within the waiting period defined by Idaho Code § 72-402. Claimant is not entitled to temporary disability benefits for the five shifts she missed directly after the accident.

57. Claimant asserts entitlement to temporary disability benefits from the time she quit her job to the present and into the future. However, Claimant testified that she quit her job due to her hip condition. As found above, Claimant has failed to prove that her hip condition was causally related to her accident. Therefore, she is not entitled to temporary disability benefits for disability resulting from her hip condition.

Other Issues

58. Medical care. Claimant asserts that she is entitled to reasonable medical care for her hip condition, including a total hip arthroplasty. This issue has been rendered moot by Claimant's failure to prove that her hip condition was caused by her accident.

59. Attorney Fees. Claimant asserts entitlement to attorney fees pursuant to Idaho Code § 72-804 on the basis that Surety unreasonably denied medical care for her hip condition. Surety's denial was not unreasonable because Claimant has failed to prove that her hip condition resulted from the compensable accident. Claimant is not entitled to attorney fees.

60. Apportionment. The issue of apportionment pursuant to Idaho Code § 72-406 is moot, as Claimant has not proven that she suffered permanent disability as a result of the accident.

61. Credit/offset. On page 3 of their post-hearing brief, Defendants withdrew the issue of whether they are entitled to a credit or offset for benefits paid to Claimant.

ORDER

Based on the foregoing analysis, IT IS HEREBY ORDERED That:

1. Claimant has failed to prove that she suffered a hip injury caused by her industrial accident.
2. Claimant has failed to prove that she is entitled to temporary disability benefits.
3. Claimant has failed to prove that she is entitled to attorney fees.
4. All other issues are moot.
5. Pursuant to Idaho Code § 72-718, this decision is final and conclusive as to all matters adjudicated.

DATED this __24th____ day of February, 2012.

INDUSTRIAL COMMISSION

/s/ Thomas E. Limbaugh, Chairman

/s/ Thomas P. Baskin, Commissioner

/s/ R.D. Maynard, Commissioner

ATTEST:

_____/s/_____
Assistant Commission Secretary

CERTIFICATE OF SERVICE

I hereby certify that on the __24th__ day of February, 2012, a true and correct copy of the foregoing **FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER** was served by regular United States Mail upon each of the following:

CLINTON E MINER
4850 N ROSEPOINT WAY STE 104
BOISE ID 83713

JON M BAUMAN
PO BOX 1539
BOISE ID 83701-1539

eb

_____/s/_____